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No. 93-377

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHELM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE EMPIRE STATE PETROLEUM ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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No. 93-377

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

Motion for Leave to File Brief *Amicus Curiae* in Support of the Petition for Writ of Certiorari to the Court of Appeals of the State of New York

The Empire State Petroleum Association, Inc. (ESPA) respectfully moves this court pursuant to Supreme Court Rule 37.2 for leave to file the accompanying brief *amicus curiae* in support of the Petition for Writ of Certiorari. The petitioner has consented to the filing of this brief. Consents of the two respondents were requested but refused. ESPA previously participated and filed briefs as *amicus curiae* over respondents' objections before the Appellate Division of the New York State Supreme Court, Third Department on this Court's remand of this matter for further consideration, and also before the New York State Court of Appeals on the appeal of the Appellate Division opinion and order.

Interest of the *Amicus Curiae*

The Empire State Petroleum Association, Inc. is a New York not-for-profit trade association representing approximately 450 individual member companies engaged in supplying and marketing refined petroleum products and re-

lated services to consumers throughout the State of New York.[1] ESPA's membership is predominantly comprised of independent wholesale and retail distributors of gasoline, diesel fuel, heating oil, and other petroleum based products. ESPA members who are engaged in motor fuel distribution or who own or operate retail service stations, particularly in the central and western regions of New York State, compete with Indian retailers for the sale of motor fuels to non-Indians. ESPA dealers and service station operators collect and remit to the State Department of Taxation and Finance motor fuel taxes on the sale of products to consumers. In contrast, Indian retailers refuse to pay these taxes on sales of motor fuel products to non-Indians although such taxes are lawful and are required to be collected. Consequently, Indian retailers enjoy a tremendous price advantage on the sale of their products, a price advantage with which our members cannot compete.

ESPA's purpose in filing this motion and the accompanying brief is to bring to the Court's attention matters of significant public importance which will not be presented by the parties. Specifically, the final outcome of this case will not only determine the validity of the state's cigarette tax regulations, but will also impact upon similar motor fuel tax regulations, and ultimately the competitive viability of ESPA's members. In addition, ESPA believes that the case has widespread implications concerning the state's ability to balance delicately the sovereign rights of an Indian nation with its own lawful right to collect taxes on sales to non-Indians, and the effect of such efforts by the state upon competing businesses, the public and the local economies.

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[1]ESPA has no parent or subsidiaries to list pursuant to Rule 29.1.

The cigarette tax scheme at issue in this case (20 NYCRR Parts 335.6 and 335.7)[2] was designed to alleviate tax evasion which occurs on the sale of cigarettes on Indian reservations to non-Indians. The regulations are nearly identical to motor fuel tax regulations of the Department (20 NYCRR Parts 414.6 and 414.7) which were likewise created to prevent the tax-free sales of motor fuel products on Indian Reservations to non-Indians by Indian retailers. Both the cigarette and motor fuel tax schemes were simultaneously prepared, published for public comment and promulgated. Both sets of regulations became effective in November of 1988.

The similarity between the two schemes has been recognized by the New York courts. In *Matter of New York State Department of Taxation and Finance v. MacLeod*, 168 AD2d 802 (3d Dept. 1990) the Appellate Division held that New York's motor fuel tax scheme was invalid based upon its own previously issued opinion in this case involving the very cigarette tax regulations at issue here. See *Milhelm Attea and Brothers v. Taxation and Finance*, 164 AD2d 300 (3d Dept. 1990). Consequently, this Court's decision whether to grant certiorari and hear argument on the validity of the cigarette tax scheme will directly affect the related motor fuel regulations and ultimately the economic viability of our members.

The failure of Indian retailers to collect state taxes on sales to non-Indians not only deprives New York of tax revenue to which it is lawfully entitled, but oppresses competition and harms legitimate operators who collect state

[2]In December of 1990, these regulations were renumbered without any substantive change. Former numbering is used here to avoid confusion in reviewing the state court opinions.

and local taxes on motor fuels and cigarettes. A gallon of gasoline costing $1.25 can be sold without state taxes for 32 cents less. A carton of cigarettes without state taxes is over five dollars cheaper. With these illegal price "discounts", competing businesses continue to lose non-Indian patronage to Indian retailers who openly market the sale of their tax-free products. The loss in motor fuel tax revenue has been estimated to be $35 million annually (Petition, p. 12, footnote 5). This is only a fraction of the loss in motor fuel sales that would otherwise be made by non-Indian businesses who collect taxes.

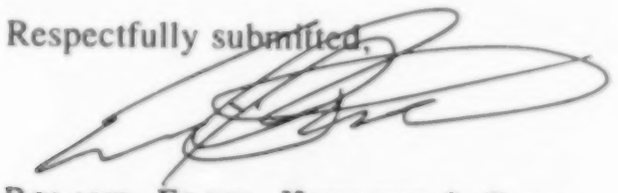
The motor fuel and cigarette tax schemes were crafted by the department to provide for the fair and equitable application and collection of state taxes on sales to non-Indians. In doing so, the regulations do not curtail the sale of tax-free products to Indians on reservations and only place minimal recordkeeping requirements upon Indian traders. If upheld, the state can prevent pervasive tax evasion while simultaneously restoring a fair, open and competitive environment to the retail motor fuel market.

As indicated in the petition, certiorari should be granted due to the inherent conflict between the New York Court of Appeals' decision and this Court's prior opinions. The parties to this matter are properly concerned with establishing their legal points as to the propriety and necessity for the granting of certiorari. ESPA, however, respectfully requests that the Court also give consideration to the broader public policy aspects of this case in determining whether to grant certiorari. The accompanying brief is submitted with the intention that it will assist the Court by bringing these matters to its attention.

WHEREFORE, the Empire State Petroleum Association, Inc. respectfully requests that this Motion for leave to file the annexed brief *amicus curiae* be granted.

Dated: Albany, New York
October 4, 1993

Respectfully submitted,



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Brief of the Empire State Petroleum Association, Inc. as *amicus curiae* in support of the Petition for Writ of Certiorari to the Court of Appeals of the State of New York

Preliminary Statement

This brief is filed on behalf of the Empire State Petroleum Association, Inc. (ESPA) as *amicus curiae* in support of the Petition for Writ of Certiorari to the Court of Appeals of the State of New York which was filed by the New York State Attorney General on September 7, 1993.

Interest of the *Amicus Curiae*

The interest of the Empire State Petroleum Association, Inc. (ESPA) is set forth in its motion for leave to file this *amicus curiae* brief, to which motion this brief is annexed.

Summary of Argument[1]

Certiorari should be granted in this matter for two reasons. First, the Court of Appeals' ruling is at odds with this court's prior opinions in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980), and most recently, *Oklahoma Tax Commission v. Citizen Band Potowatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). It was the *Potowatomi* case which this court ordered the Appellate Division to consider on remand of this matter (Petition A17-A18). In addition, ESPA believes that matters of public importance, which go beyond the state's lawful right to collect taxes on sales of products to non-Indians, warrants the granting of certiorari. Specifically, the method by which the state can lawfully prevent tax avoidance by non-Indians will significantly impact the economic viability of competing businesses, and possibly that of surrounding communities as well.

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[1]ESPA respectfully incorporates by reference the statement of the case as contained in the Petition.

ARGUMENT

I.

The Petition for Certiorari should be granted since a review of the merits and a decision of this Court will have significant public policy implications

ESPA respectfully submits that certiorari and a decision on the merits is warranted in this case because it involves matters of great public importance. A ruling of this court would not only settle the inherent conflict between the Court of Appeal's decision and this Court's prior decisions, but would also establish the parameters within which the state may lawfully enforce its right to collect taxes on sales to non-Indians in harmony with federal Indian laws, including those relating to Indian traders (25 U.S.C. §262 *et seq.*).

As noted in the accompanying motion, ESPA is concerned with the validity of motor fuel tax regulations (20 NYCRR 414.6 and 414.7) which are similar to the contested cigarette tax regulations here. This Court's decision will naturally determine the legal status of the motor fuel regulations promulgated by the state to prevent motor fuel tax evasion by non-Indians.

Without question, the state is entitled to payment of taxes on sales of taxable products sold by Indians to non-Indians and may even regulate Indian retailers on reservations to collect such taxes. *Potowatomi*, 498 U.S. 505, 512. It is the method of securing the collection and payment of those taxes that has proven difficult.

Attempts to enlist the aid of Indian retailers or Indian nations have not been successful, and prior regulations have been struck down by the New York Court of Appeals (*Herzog Brothers Trucking, Inc. v. State Tax Commission*, 69 NY2d 536 [1987] and 72 NY2d 720 [1988]). In response, the state carefully designed cigarette and motor fuel tax structures that provide for the fair application and collection of state taxes on sales to non-Indians while only minimally burdening Indian traders. (20 NYCRR 414.6 and 414.7—motor fuel; 20 NYCRR 335.6 and 335.7—cigarettes). ESPA has long supported the development and implementation of an equitable motor fuel tax scheme which insures that all members of industry and the consumer pay their proportionate share of taxes and that no one is permitted to avoid taxes illegally. Nonetheless, without these regulations, the avoidance of tax will continue unabated to the detriment of the state, its businesses, and its citizens.

The avoidance of tax on the sales of cigarettes and motor fuels is a serious problem. The state reports tax revenue losses of approximately $65 million in cigarette taxes per year and approximately $35 million in motor fuel taxes each year because of reservation sales to non-Indians.[2]

The temptation for non-Indians to purchase motor fuel products from a reservation is enticing given the price discrepancy when taxes are not charged on the sale. A gallon of gasoline which costs a $1.25 includes approximately 50 cents in taxes, of which 32 cents are attributable to state taxes. A gallon of diesel which costs a $1.35 includes approximately 60 cents in taxes, of which 35 cents are

[2]Even these figures may be underestimated. As the petition notes, the estimate is based only on those suppliers who responded with figures. (See Petition, p. 12, fn. 5.)

attributable to state taxes. A 32 or 35 cents per gallon price advantage is a margin with which our members cannot compete.[3]

Since many state highways and roads traverse reservations, there are numerous sites offering tax-free sales of cigarettes and motor fuels. Those members of ESPA who operate retail gasoline service stations located around or near Indian reservations and those members who distribute and supply motor fuel and other products to those service stations are suffering economic losses from the tax-free sales made on motor fuel products sold on Indian reservations to non-Indians. According to ESPA, some of its members have been forced out of business, while others are in jeopardy of becoming so. Some have downsized due to considerable loss of business. Distributors and service station operators cannot compete with Indian retailers who do not collect and pay state taxes and who aggressively and openly market this fact to customers.

While the threat to small business is continuing, it is not solely limited to service station dealers. The loss or downsizing of retail service station dealers carries further broad based detrimental economic impacts. The loss of stations would mean the loss of service to the public, a decrease in competition among service station operators, and less choice of products, service, and retail establishments to the consumer. The closing of service stations results in the attendant loss of revenue, both from the retail business and its employees, to the region, and an increase in unemploy-

[3]ESPA's members further suffer in damage to their reputation. Despite widespread publicity, ESPA reports that many consumers erroneously believe that the honest marketer is overcharging the customer in the sale of motor fuel products.

ment of workers. Thus, the avoidance of tax has a direct and immediate adverse impact upon the counties, towns, villages and other local political subdivisions of the state.

The adverse effects of these tax-free sales have an even greater geographic implication. Since tractor trailers typically can carry over 200 gallons of fuel, they can fill up with tax-free motor fuel on a reservation in Western New York and have sufficient fuel to travel to Boston, for example, and return without refueling, bypassing all the stations and truck stops along the way. Understandably, those operators would suffer economic losses.

ESPA respectfully emphasizes that this Court's ruling concerning the validity of these regulations will not only impact upon sales of motor fuels and cigarettes, but ultimately any other product which is or could be sold on reservations to non-Indians. Indian reservations are located throughout the state, including Northern New York and Long Island. Without doubt, other Indian nations and entrepreneurs within the state will monitor this Court's decision. Should the Court refuse to hear the merits of this matter, and affirm the validity of the regulations, it will essentially permit tax evasion to take place throughout the State of New York, and enhance the prospects of additional tax evasion with respect to many products and services taxed by the state previously not offered by Indian retailers to non-Indians.

II.

The Petition For Certiorari should be granted since the Court of Appeals decision is in direct conflict with the decisions of this court permitting states to impose minimal burdens on Indian traders to prevent the avoidance of tax by non-Indian purchasers of products from Indian retailers

Relying mostly on its previous opinion in *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 69 NY2d 536 (1987) and 72 NY2d 720 (1988), the New York Court of Appeals found New York's cigarette tax regulations invalid under a rigidly applied preemption test because the respondents are Indian traders. However, as this Court noted in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989):

> "Questions of pre-emption in the [area of Indian affairs] are not resolved by reference to standards of pre-emption that have developed in other areas of the law, and are not controlled by 'mechanical absolute conceptions of state or tribal sovereignty.' [Citation omitted.] Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. *Each case 'requires a particularized examination of the relevant state, federal and tribal interests'* " [Citation omitted] (Emphasis supplied).

It is respectfully submitted that in reviewing the subject regulations, the Court of Appeals did not perform such an examination but rather adhered to its prior *Herzog*

determinations, in direct conflict with this Court's decisions in *Moe, Colville* and *Potowatomi*. In *Colville*, this Court confirmed its prior decision in *Moe* stating that state excise and sales taxes on cigarettes could be collected on non-Indian purchases made on Indian reservations. 447 U.S. at 151. Indian retailers, therefore, could be required to collect such taxes on their sales to non-Indians. This Court's *Colville* opinion contains several pertinent points. First, this Court approved the imposition of regulatory record-keeping requirements upon operators of Indian smokeshops, who were licensed Indian traders, to assist in the collection of a properly imposed state tax. Perhaps most significant was that this Court recognized and validated a state's power to seize shipments of unstamped cigarettes travelling to the reservation from out-of-state suppliers even though the tribal businesses were "concededly exempt from state taxation, [and] no state tax is due when the cigarettes are in transit." 447 U.S. at 161. This Court continued:

> "We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures. Although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the tribes, as here, have refused to fulfill collection and remittance obligations which the state has validly imposed. It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries. [Citation omitted] By seizing cigarettes en route to the reservation, the state polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests."

447 U.S. at 161-162.

If the *Colville* holding is not in direct contravention to the conclusion of the Court of Appeals ruling below (i.e., that the Indian trader laws automatically place every trader beyond state regulatory authority) then this Court's ruling in *Potowatomi* paints an even sharper contrast.

Relying on *Colville* and *Moe*, this Court ruled in *Potowatomi* that the Indian tribe's sovereign immunity did not prevent the State of Oklahoma from taxing cigarette sales to non-Indians at the tribal store. Furthermore, it was stated that the tribe has an obligation to assist in the collection of validly imposed state taxes on such sales. 498 U.S. at 512. While this Court explicitly recognized that Indian sovereign immunity could bar the State of Oklahoma from pursuing a lawsuit directly against the tribe for the tax imposed, it noted that there existed adequate alternate remedies to the state. Among those suggested was the collection of the state tax from cigarette wholesalers:

> "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of tribe are not liable for damages in actions brought by the State. See, *Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, *States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, (Colville, supra,* 447 U.S. at 161-162), *or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, City Vending of Muskogee, Inc. v. Oklahoma Tax Commission,* 898 F.2d 122 (CA10 1990) . . ." (Emphasis added.)

498 U.S. at 514.

This Court thus recognized that vendors engaged in trade with Indian tribes on reservations are not automatically absolved or immune from complying with duly promulgated state tax regulations intended to ensure tax payment for sales made to non-Indians. In addition, the state is empowered to use such traders to assure that the proper taxes are, in fact, collected and remitted. The imposition of such a duty upon vendors trading with Indians is, in fact, a minimal burden permissible under the balancing of federal, Indian, and state interests.

The Court of Appeals opinion improperly distinguishes *Potowatomi* on a ground not considered or mentioned by any of this Court's opinions. Specifically, the Court stated that the remedies listed in *Potowatomi* "might somehow be used to retroactively collect taxes unpaid on past sales" (Petition A11) but did not permit the state to exercise prospective regulatory authority over Indian traders. This distinction does not appear in this Court's *Potowatomi* decision, and neither is it logical. Whether a state possesses the right to place minimal burdens upon an Indian trader will not be altered or influenced by the fact that such burden is prospective or retroactive.

The Court of Appeals further ruled that even if minimal burdens were permissible, the instant tax regulations impose "significant" burdens which require their invalidation. This ruling is in error since, when compared to the tax scheme approved by this court in *Colville*, Washington State's record keeping requirements were more pervasive and yet, were still approved by this Court.

The refusal to grant certiorari will permit the avoidance of tax in contravention of principles of sound public policy and federal law. As this Court has stated:

> "We do not believe that principles of federal Indian Law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

Colville, 447 U.S. at 155.

Conclusion

For the reasons stated above, the state's Petition for a Writ of Certiorari should be granted.

Dated: Albany, New York
October 4, 1993

Respectfully submitted,

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